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IN THE

Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA, *Petitioner*,

v.

ALBERTO ANTONIO LEON, et al., *Respondents*.

COMMONWEALTH OF MASSACHUSETTS, *Petitioner*,

v.

OSBORNE SHEPPARD, *Respondent*.

STATE OF COLORADO, *Petitioner*,

v.

FIDEL QUINTERO, *Respondent*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, AND THE SUPREME COURT OF COLORADO

BRIEF OF NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AMICUS CURIAE

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BRIEF OF NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AMICUS CURIAE

INTEREST OF AMICUS

(1) The National Legal Aid and Defender Association [NLADA] is a not-for-profit organization whose members include the great majority of public defender offices, coordinated assigned counsel systems and legal services agencies in the nation. The organization also includes two thousand individual members, most of whom are private practitioners.

NLADA's primary purpose is to assist in providing effective legal services to persons unable to retain counsel. In carrying out this purpose, NLADA has a strong interest in protecting its members' clients' constitutional rights, particularly from violation by police, and in assuring full access to the courts for trial and appellate level litigation concerning those rights.

(2) NLADA joins respondents in opposing any modification of the exclusionary rule.

(3) NLADA has received the written consent of all parties for the filing of this brief.

SUMMARY OF ARGUMENT

The exclusionary rule in its present form is the sole means of effectively protecting the policy values underlying the Fourth Amendment. It was preceded by widespread police illegality, and it has resulted in extensive improvement in police practices at minimal evidentiary cost. Weakening the rule would produce a corresponding reversion to police illegality.

The Fourth Amendment was designed to limit the conduct of police and of magistrates, and the founders understood that these limits were preferable to placing discretionary power in the hands of the police. The

occasional loss of evidence or a conviction resulting from adherence to Fourth Amendment values was properly seen as the lesser danger.

Fourth Amendment jurisprudence already takes into account an officer's reasonable mistakes of fact and accords great deference to a magistrate's decision to issue a warrant.

A "reasonable mistake" or "good faith" exception to the exclusionary rule is inherently subjective, and it would undermine the Warrant Clause, erode protection of Fourth Amendment rights, especially of minorities, halt substantive development of Fourth Amendment law, encourage police ignorance and be administratively unfeasible; it would ultimately leave people "secure . . . only in the discretion of the police."

In the past ten years this Court has significantly narrowed the scope of application of the rule on the basis of objective criteria. No further modification is warranted.

ARGUMENT

A "REASONABLE MISTAKE" OR "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE IS INHERENTLY SUBJECTIVE; IT WOULD UNDERMINE THE WARRANT CLAUSE, ERODE PROTECTION OF FOURTH AMENDMENT RIGHTS, ESPECIALLY OF MINORITIES, HALT SUBSTANTIVE DEVELOPMENT OF FOURTH AMENDMENT LAW, ENCOURAGE POLICE IGNORANCE AND BE ADMINISTRATIVELY UNFEASIBLE; IT SHOULD, THEREFORE, BE REJECTED.

INTRODUCTION

The history of American freedom is, in no small measure, the history of procedure. *Malinski* v *New York*, 324 US 401, 414 (1945), Frankfurter, J., concurring.

A "reasonable mistake" or "good faith" exception to the exclusionary rule would respond to the frustrations of police officers who execute unconstitutional warrants or err in determining whether they have sufficient information to justify an arrest or stop or excuse the seeking of a warrant. Evaluating the question at bar by reference to police officers' states of mind, however, would turn the Fourth Amendment on its head: Adopting such a rule would place the police above the law and unleash forces that would, in the end, leave people "secure . . . only in the discretion of the police." *Beck* v *Ohio*, 379 US 89, 98 (1964).

To the framers of the Constitution, the Fourth Amendment was "*designed*," "after consulting the lessons of history, . . . to place obstacles in the way of a too permeating police surveillance," for they understood that the latter "was a greater danger to a free people than the escape of some criminals from punishment." *United States* v *DiRe*, 332 US 581, 595 (1948) (emphasis added). The privacy rights protected by the Amendment are among our most cherished, yet they are among "the most difficult to protect [, for] officers themselves are the chief invaders, there is no enforcement outside of court[,]" and, unlike many other constitutional rights, "there is no way in which the innocent citizen can invoke advance protection." *Brinegar* v *United States*, 338 US 160, 181-182 (1949), Jackson, J., dissenting.

Moreover, the values of the Fourth Amendment are particularly vulnerable to criticism. Its benefits are largely abstract and unseen — the unlawful stop or search of a home that is *not* made, the unfounded warrant that is *not* issued — while the costs of enforcing its mandates are concrete and irritating — the suppression of actual evidence. In times of great frustration about crime, this apparent anomaly leaves the rules by which the Amendment is enforced easy targets for criticism, yet as Justice Stewart emphasized in

Coolidge v *New Hampshire*, 403 US 443, 455 (1971), it is in times such as these that the Amendment and these rules must be most vigorously protected.

In *Weeks* v *United States*, 232 US 383 (1914), this Court unanimously held that the values underlying the Fourth Amendment could *only* be adequately protected by excluding from evidence in federal court materials obtained unconstitutionally by federal officers. In so ruling, this Court stressed that *without an exclusionary rule "the protection of the Fourth Amendment . . . is of no value, and . . . might as well be stricken from the Constitution."* 232 US at 393 (emphasis added).

These words were reiterated in *Elkins* v *United States*, 364 US 206, 209-210 (1960), and echoed again in *Mapp* v *Ohio*, 367 US 643, 660 (1961), where, in the words of a former Attorney General, Justice Clark, this Court held that the exclusionary rule is "a clear, specific, and constitutionally required — even if judicially implied — deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to 'a form of words'[,] . . . an empty promise."[1]

ADOPTION OF THE EXCLUSIONARY RULE WAS NECESSITATED BY WIDESPREAD POLICE ABUSE, AND THE RULE IN ITS PRESENT FORM PROVIDES THE ONLY MEANS OF PROTECTING THE VALUES AND POLICIES OF THE FOURTH AMENDMENT.

Recent decisions of this Court have focused on deterrence of unlawful police conduct as the primary justification for the exclusionary rule, minimizing the value of other considerations. Cf., e.g., *Stone* v *Powell*,

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[1] While *Mapp* and *Wolf* v *Colorado*, 338 US 25 (1949), were both decided by a closely divided Court, in each case opponents of applying the exclusionary rule to the states based their positions *not* on opposition to the rule itself but on considerations of federalism. It is only recently that any member of this Court has expressed opposition to the rule itself.

428 US 465, 482-486, 491-493 (1976); *United States* v *Peltier*, 422 US 531, 536-539 (1975). Deterrence was not even discussed as a basis for the rule until *Elkins*, however, and history teaches that the rule furthers at least four other vital goals as well:

First, the exclusionary rule upholds "the imperative of judicial integrity" in litigation involving Fourth Amendment rights. This Court stressed in *Elkins*, 364 US at 223, adopting Justice Holmes' dissent from *Olmstead* v *United States*, 277 US 436, 469 (1928), that " 'no distinction can be taken between the Government as prosecutor and the Government as judge.' " With regard to wilful violations, Justice Powell agrees. *Brown* v *Illinois*, 422 US 590, 611 (1975), Powell, J., concurring in part;[2]

Second, as this Court pointed out in *Terry* v *Ohio*, 392 US 1, 12 (1968), the rule is the *sole* judicial means by which these rights may effectively be protected:

> . . . *experience has taught that it [the exclusionary rule] is the only effective deterrent to police misconduct in the criminal context*, and that without it the constitutional guarantees against unreasonable searches and seizures would be a mere "form of words." (emphasis added)

See also Traynor, *"Mapp* v *Ohio* at Large in the Fifty States," 1962 Duke L J 319, 333; *Franks* v *Delaware*, 438 US 154, 169 (1978); *Elkins*, *supra*, 364 US at 220;

Third, the exclusionary rule plays a critical role in the development of a substantive Fourth Amendment law. Mertens and Wasserstrom illustrate this point in "The Good Faith Exception to the Exclusionary Rule:

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[2] The intent with which a violation is committed is properly of no consequence, however, for, apart from the difficulty of ascertaining intent, the Fourth Amendment protects " 'against the dangers of the overzealous as well as the despotic.' " *Gerstein* v *Pugh*, 420 US 103, 118 (1975), citing *McNabb* v *United States*, 318 US 332, 343 (1943).

Deregulating the Police and Derailing the Law," 70 Geo L J 365, 404, 405-406 (1981):

> By functioning as the primary mechanism through which the courts develop and articulate the limits of the Fourth Amendment itself, the exclusionary rule plays an indispensable role in preventing Fourth Amendment violations . . . even when a court declines to suppress evidence.

Fourth, the exclusionary rule serves as an overriding symbol of our society's commitment to the primacy of law over the raw power of government and its agents "engaged in the often competitive enterprise of ferreting out crime." *Johnson* v *United States*, 333 US 10, 14 (1948). Indeed, to many observers, "[T]he symbolic value of the exclusionary rule is perhaps its most immeasurable aspect." Geller, "Is the Evidence in on the Exclusionary Rule?" 67 ABA J 1642, 1645 (1981).

Protection of Fourth Amendment rights is a difficult process under the best of circumstances, but, contrary to the image offered by the Solicitor General of beleaguered police trying to grapple with an asserted tangle of laws, this Court recognized as long ago as *Weeks*, *supra*, that law officers in this country too often intentionally violate the law. There is a "tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions." 232 US at 392. This conclusion was reiterated in *Elkins*, *supra*, 364 US at 217-218, citing with approval from Justice Jackson's dissent in *Brinegar*, *supra*, 338 US at 181:

> *Only occasional and more flagrant abuses come to the attention of the court . . . There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is*

> *made, about which courts do nothing, and about which we never hear.* (emphasis added)[3]

Only with a strong exclusionary rule can the privacy rights of all Americans be protected from such abuse.

It is, of course, self-evident that the Fourth Amendment does not by its express language specify how it is to be enforced. It neither states that evidence obtained in violation is to be suppressed nor that evidence obtained in a "reasonably mistaken belief" that the police conduct was legal is to be admitted. Similarly, though, no language in the Constitution says how this Court is to enforce other constitutional rights, yet to give *effective* meaning to the equal protection clause in the areas of public education and voting, for example, this Court has ruled that separate educational facilities for black and white children are inherently unequal, *Brown* v *Board of Education*, 347 US 483 (1954), and that, in drawing legislative boundaries, each state must accord equal strength to each citizen's vote. *Baker* v *Carr*, 368 US 186 (1962). The Constitution by its language also does not state that the right to assistance of counsel includes the right to *effective* assistance, but just as the Court inferred such a requirement in *Powell* v *Alabama*, 287 US 45, 71 (1932), to give that right meaning, so, too, have *Weeks*, *Mapp* and their progeny required suppression of unconstitutionally seized evidence in order to assure a viable Fourth Amendment.

If appellate decisions interpreting the Fourth Amendment are at times difficult to understand, and if individual officers cannot be deterred from actions held to be errors through subsequent changes in the law, then the answers lie in better training of law enforcement personnel, better communication between prosecutors' offices and police agencies and, to the extent possible, more consistent and understandable

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[3] See also pp 18-19, *infra*.

judicial opinions. Moreover, principles of retroactivity may be re-examined. Cf., e.g., *United States* v *Johnson*, 457 US 537 (1982). To react to these and other circumstances by reducing the level of Fourth Amendment protections, particularly to the level of police officers' subjective understanding, however, would subvert the Amendment and the values it embodies. The "[r]ights declared in words" would ". . . be lost in reality." *Weems* v *United States*, 217 US 349, 373 (1910).

AN OFFICER'S INTENT IS IRRELEVANT; A "GOOD FAITH" OR "REASONABLE MISTAKE" TEST IS INHERENTLY SUBJECTIVE AND WOULD SEVERELY UNDERMINE FOURTH AMENDMENT RIGHTS.

— The Irrelevance Of Intent

The Fourth Amendment exists *not* to assist the police or excuse their mistakes but to protect the privacy rights of all Americans by limiting police conduct and that of magistrates. Officers' beliefs as to the legality of their actions are irrelevant. This Court has emphasized in two major Fourth Amendment decisions that

> . . . good faith on the part of the arresting officers is not enough. *Henry* v *United States*, 361 US 98, 102 (1959)

> We may assume that the arresting officers acted in good faith in arresting the petitioner. But "good faith on the part of the arresting officers is not enough." . . . [citing *Henry, supra*] If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects" only in the discretion of the police. *Beck* v *Ohio, supra*, 379 US at 98.

This axiom was recently reaffirmed in *Delaware* v *Prouse*, 440 US 648, 654 (1979), when Justice White stressed in his opinion for the Court that "the reasonableness test usually requires, at a minimum, that *the facts upon which an intrusion is based be capable of measurement against 'an objective standard.'* " (emphasis added) See also *United States* v *Ross*, 456 US 798, 808 (1982).

Consider also *Reid* v *Georgia*, 448 US 438 (1980); *Florida* v *Royer*, __ US __ (1983).

The point was further explained in *Scott* v *United States*, 436 US 128, 138 (1978), when this Court rejected the suggestion that an arrest based objectively on probable cause but for subjectively improper reasons should be invalidated:

> . . . *the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.* (emphasis added)[4]

Justice White also spoke to the issue in his dissent from the dismissal of *certiorari* in *Massachusetts* v *Painten*, 389 US 560, 565 (1968):

> . . . sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.

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[4] Elsewhere in *Scott*, Justice Rehnquist suggests in *dictum* that while an officer's intent is irrelevant to the determination of whether there has been a substantive violation, it may be material to the decision of whether to suppress the fruits of that violation. 436 US at 135-136. This distinction is inconsistent with the constitutional foundations of the exclusionary rule, however, and it fails properly to consider the broad values served by the Amendment and the rule. See pp 4-6, *supra*.

Lower courts, too, have recognized the irrelevance of intent. In *Bell* v *United States*, 254 F2d 82 (DC Cir 1958), for example, an officer had arrested the defendants for "investigation of housebreaking." Judge Prettyman, joined by then-Judge Burger, noted that there is no crime of "investigation" but discounted the officer's improper state of mind and focused instead on the objective facts at hand:

> The question is not what name the officer attached to his action; it is whether, in the situation in which he found himself, he had reasonable ground to believe a felony had been committed and that the men in the car had committed it. 254 F2d at 86.

See also *United States* v *Bugarin-Casas*, 484 F2d 853, 854 (9th Cir 1973) at n 1; *Chaney* v *Wainwright*, 460 F2d 1263 (5th Cir 1972).

— The Inherent Subjectivity Of A "Good Faith" Or "Reasonable Mistake" Test

A "good faith" or "reasonable mistake"[5] standard in applying the exclusionary rule would be subjective under any definition. While the Solicitor General argues that subjectivity could be avoided by requiring that an officer's personal belief be "objectively reasonable" as well, neither objectivity nor clarity can be provided by reference to a "reasonably well-trained officer's" mistaken belief as to the *law*. Allowing an officer's beliefs as to the *law* to carry weight under *any* circumstances is precisely what makes the rule subjective. Rather than eliminating subjectivity, inclusion of a "reasonableness" element in the test

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[5] In the instant cases, the United States has abandoned the term "good faith," used in its Supplemental Brief in *Illinois* v *Gates*, __ US __ (1983), in favor of "reasonable mistake." The definition of the terms remains the same in both of the Government's briefs, however.

merely adds a second layer of it. Emphatically rejecting the concept of "good faith" or "reasonable belief", Professor LaFave recently underscored the intrinsic weakness of the proposed exception:

> . . . *it is nothing short of nonsense to talk of a reasonable belief that there is probable cause*, for the probable cause standard itself takes into account reasonable mistakes of fact.[6] If mistakes of law were also to be taken into account, then the law becomes whatever the officer thinks it is. LaFave letter, Hearings on the "Exclusionary Rule Bills," 97th Congress, 1st and 2nd Sessions, Senate Judiciary Committee, Subcommittee on Criminal Law [hereinafter Hearings] (1982) at 793-794 (emphasis added)

Even if a "reasonable mistake" standard could somehow be considered objective, unless the police were required to be fully aware of what the law is, the level of tolerated police activity would sink below that permitted by the Fourth Amendment. As a matter of social policy this would be unthinkable, for it would weaken the Amendment itself and create the irony of allowing those charged with enforcing our most basic laws to be partially ignorant of them.

Only in a case involving a subsequent retroactive change in the law could police misconduct be considered to be in "complete good faith." *Michigan* v *Tucker*, 417 US 433, 447-448 (1974). The issue in such a case is more accurately one of retroactivity principles, however.

— The Impact Of A "Reasonable Mistake" Or "Good Faith" Exception On Fourth Amendment Rights

— WARRANT CASES

In cases involving warrants, a "good faith" exception to the exclusionary rule would virtually destroy the

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[6] See discussion, *infra*, pp 14-15.

Warrant Clause. Warrants are usually issued *ex parte* and generally after at best perfunctory scrutiny. Cf., e.g., LaFave and Remington, "Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions," 63 Mich L Rev 987, 992 (1965). They may be, and in some states often are, issued by clerks or part-time magistrates untrained in the law. Cf. *Shadwick* v *City of Tampa*, 407 US 345 (1972). Further, the Warrant Clause, by its language, is directed at protecting against unlawful or abusive *issuance* of a warrant. Cf. *Weeks*, *supra*, 232 US at 394. For these reasons, full judicial review of decisions to issue warrants is essential. If a "good faith" exception were adopted in such cases, effective review, judicial self-policing and access of litigants to the courts for protection of Fourth Amendment rights in criminal cases would all be severely curtailed.

Justice Powell's opinion for the Court in *United States* v *United States District Court*, 407 US 297, 315-316 (1972), illuminates why police good intentions have no place in determining the consequences of violations of the Warrant Clause:

> *The warrant clause* of the Fourth Amendment is not dead language. Rather, it has been "a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It *is not an inconvenience to be somehow 'weighed' against the claims of police efficiency*. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are a part of any system of law enforcement." (cite omitted; emphasis added)

If an officer's subjective "good faith" were to become the standard, the scope of review would be so narrow that only in cases of perjury or reckless submission of an

affidavit could a warrant be challenged. If an officer's "reasonable belief" that he or she had probable cause or was seeking the "essential" "detached judgment of a neutral magistrate," *Gerstein* v *Pugh*, 420 US 103, 114 (1975), were all that was required, there would be no effective way to determine that a warrant was, in fact, issued by a person "sever[ed] . . . from activities of law enforcement," *Shadwick, supra*, 407 US at 350; *Coolidge, supra*, was based on probable cause, or "particularly describ[ed] the place to be searched, and the persons or things to be seized." The Warrant Clause, the "bulwark of Fourth Amendment protection," *Franks, supra*, 438 US at 164, would become "dead language," a desiccated relic.

Further, if a primary justification for a "reasonable mistake" exception is to account for an officer's need to make split-second decisions in rapidly unfolding encounters, cf., e.g., Brief for the United States at 49; *United States* v *Williams*, 622 F2d 830, 842 (5th Cir 1980) (*en banc*), concurring opinion, this consideration argues *against* adoption of such an exception in cases where, because a warrant has been obtained, there clearly was no need for instantaneous action.

— IN GENERAL

In either a warrant case or a warrantless case, a "reasonable mistake" or "good faith" exception would also be an abdication of the judiciary's constitutional duty, for it would effectively give the police a voice in the probable cause determination. It is, however, emphatically the responsibility of the courts to determine the legality of police conduct. Justice Powell emphasized this point as well in *Gerstein* v *Pugh, supra*, 420 US at 112-113, citing from *Johnson* v *United States, supra*, 333 US at 13-14:

> "The point of the *Fourth Amendment*, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual

> inferences which reasonable men draw from evidence. Its *protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.*" (emphasis added)

As Justice Jackson noted further for the Court in *Johnson*,

> Any other rule would . . . obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law. 333 US at 17.

Because of the vagaries of the human memory, attempting to reconstruct a mental state after a search or arrest has occurred would also leave courts dangerously vulnerable to, in effect, justifying searches on the basis of their results. *Johnson, supra; United States* v *DiRe, supra.*

State and federal courts are called upon to review the conduct of trial judges, magistrates and police officers in a broad range of contexts, and in *no* other situation is a "reasonable mistake of law" considered as even a factor in determining whether to affirm or reverse a decision. To single out Fourth Amendment questions for such disparate treatment would suggest hostility to its protections and be incompatible with the valued place the Amendment occupies in our society.

By condoning objectively unreasonable conduct based on asserted "good faith," such an exception would also create the anomaly of a "reasonable unreasonable search."

— Current Law Is Already Adequately Flexible

Current Fourth Amendment law is also already adequately flexible, taking into account an officer's objectively reasonable mistakes of fact and giving wide latitude to a magistrate's decision to issue a warrant. An

officer's belief that certain facts exist will, if the facts would be sufficient to create probable cause, uphold a search or seizure whether or not the facts later turn out to have existed, so long as the belief was *objectively* reasonable at the time. *Beck* v *Ohio*, *supra*; *Henry* v *United States*, *supra*; *Delaware* v *Prouse*, *supra*, 440 US at 654-655.[7] Hearsay and rumor, if properly supported, may be relied upon in order to establish probable cause, cf., e.g., *United States* v *Harris*, 403 US 573 (1971); *Draper* v *United States*, 358 US 307 (1959), and an officer receives the benefit of doubt when he or she has been required to make a quick factual judgment. *Warden* v *Hayden*, 387 US 294, 298-299 (1967). When acting on the basis of their experience, police may also attach significance to circumstances that would appear innocuous to lay persons. *United States* v *Cortez*, 449 US 411, 418 (1981).

In warrant situations, the magistrate, too, is given substantial discretion. Great deference is accorded to a magistrate's determination of probable cause, and "the resolution of doubtful or marginal cases in this area . . . [is] largely determined by the preference to be accorded to warrants." *United States* v *Ventresca*, 380 US 102, 109 (1965). In practice, a warrant is invalidated only if the magistrate's judgment was "arbitrarily exercised." Cf., e.g., *United States* v *Giacalone*, 541 F2d 508, 513 (6th Cir 1976) (*en banc*).

The foregoing observations illustrate the ultimate flaw in Petitioners' arguments: The balance between individual rights and power of government depends not on the reasonableness of an officer's belief in a given case but on the balance of rights struck in the Constitution. Cf. *Dunaway* v *New York*, 442 US 200, 213-215 (1979).

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[7] *Hill* v *California*, 401 US 797 (1971), relied on by the United States, Brief at 55, is an example of a reasonable mistake of *fact* and provides no support to the argument for a "good faith" exception for mistakes of *law*.

United States v *Caceres*, 440 US 741 (1971), also relied on by the United States, Brief at 54-55, also provides no support to the government's position, for there was no constitutional error in that case.

THE EXCLUSIONARY RULE IN ITS PRESENT FORM HAS BEEN DEMONSTRABLY SUCCESSFUL IN DETERRING UNLAWFUL POLICE CONDUCT.

The arguments presented in favor of a "reasonable mistake" exception erroneously consider only a narrow, individualized notion of deterrence. In establishing a rule enforcing a constitutional right, however, this Court looks not only to conduct in single cases but to broad consequences as well; it expresses both its expectations as to what conduct is likely to be deterred and its views as to what conduct *ought* to be deterred.

Criminal trials are not private actions, moreover, and as Professor LaFave stressed in his Senate testimony, "exclusion is not a sanction to which the officer is personally subjected, but rather is a sanction that is imposed upon the system." Hearings at 328. Justice Stevens further explained the point in his concurring opinion in *Dunaway, supra*, 442 US at 221:

> The justification for the exclusion of evidence obtained by improper methods is to motivate the law enforcement profession as a whole — not the aberrant individual officer — to adopt and enforce regular procedures that will avoid the future invasion of the citizen's constitutional rights. For that reason, exclusionary rules should embody objective criteria rather than subjective considerations.

In the eyes of the law, the benefit of suppression to the accused is secondary to the long-term benefit to society from protection of the cherished and delicate constitutional rights involved.

However imprecise the exclusionary rule's deterrent impact may be in individual cases,[8] it is real. Professor

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[8] See, e.g., Mertens and Wasserstrom, "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law," 70 Geo L J 365, 389-390 (1981) and studies cited therein.

Loewenthal concluded after "countless" interviews with and observations of New York City Police officers from 1971 to 1974 and again between 1976 and 1978 that

> there is substantial evidence that the police themselves would not respect courts which did not support constitutional standards by excluding any evidence which was unconstitutionally obtained. Loewenthal, "Evaluating the Exclusionary Rule in Search and Seizure," 49 UMKC L Rev 24, 29 (1980)

Widespread systemic deterrence also exists and is readily demonstrable. Maryland Attorney General Stephen H. Sachs, previously United States Attorney for the District of Maryland, underscored the relationship between the exclusionary rule and police training during his 1982 testimony before the Senate Judiciary Committee's Subcommittee on Criminal Law:

> In my state, *Mapp* has been responsible for a virtual explosion in the amount and quality of police training in the last 20 years. Sachs, Hearings at 41

Included in post-*Mapp* training are "much longer training periods for new officers, especially courses about constitutional rights," "in-service training, [which was] virtually non-existent before," a higher calibre of training, "training geared to practical situations such as stop and frisk exercises," and "testing constitutional law knowledge on promotional exams." *Id.*, at 41-42.

Even Professor Ball, a critic of the rule, concedes that the rule has accomplished "increased police training and awareness about their responsibilities." Ball, "Good Faith and the Fourth Amendment: The 'Reasonable' Exception to the Exclusionary Rule," 69 J Crim L & Criminology 635, 656 (1978).

Observers of police practices have also noted a gradual acceptance of the exclusionary rule over time, as officers

accustomed to illegal practices have either retired or come to accept the rule and new officers, unused to the old standard, have been hired and trained to function within the law. See, e.g., Mertens and Wasserstrom, *supra*, 70 Geo L J at 394-401; Sachs, Hearings at 23, 30.

The deterrent value of the exclusionary rule and its inseparability from protection of substantive Fourth Amendment rights are also vividly illustrated by initial police reaction to *Mapp*. *Mapp* did not change substantive Fourth Amendment law one iota, yet in its wake then-New York City Police Commissioner Murphy argued that it had required total restructuring of his department's training procedures "from the very top administrators down to each of the thousands of foot patrolmen . . ." Kamisar, "Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment," 62 Judicature 66, 72 (1978) (quoting Murphy, "Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments," 44 Tex L Rev 939, 941 (1966)).

Commissioner Murphy's reaction to *Mapp* proved again this Court's crucial observation in that case that an exclusionary rule was necessary, in part, because without it local police were simply not complying with the dictates of the Fourth Amendment. *Mapp* v *Ohio*, *supra*, 367 US at 657-658. This point was also recently conceded by the Police Executive Research Forum in its prepared statement to the Senate Subcommittee Hearings. *Id.*, at 299. It was also this same observation that had led the California Supreme Court to adopt an exclusionary rule six years prior to *Mapp* in *People* v *Cahan*, 44 Cal 2d 434, 282 P2d 905 (1955). The evolution of then-Chief Justice Traynor's feelings on the issue further illustrates the need for the rule:

> My misgivings about its admissibility [illegally obtained evidence] grew as I observed that time after time it was being offered and admitted as a

> routine procedure. It became impossible to ignore the corollary that illegal searches and seizures were also a routine procedure subject to no effective deterrent . . . Traynor, "*Mapp* v *Ohio* at Large in the Fifty States," 1962 Duke LJ 319, 321-322.

Sachs emphasized the same point when he testified that "in the heat of the chase, and in the absence of effective sanction, I believe that we would define those [Fourth Amendment] rights, to put it mildly, somewhat narrowly." Hearings at 38. Stated in other words, if the exclusionary rule were weakened, there would be a corresponding increase in police violations of the Fourth Amendment.

A "GOOD FAITH" OR "REASONABLE BELIEF" TEST WOULD ENCOURAGE POLICE IGNORANCE, BE ADMINISTRATIVELY UNFEASIBLE AND WOULD CURTAIL SUBSTANTIVE DEVELOPMENT OF FOURTH AMENDMENT LAW.

— Encouragement of Police Ignorance

A "good faith" or "reasonable mistake" exception to the exclusionary rule that condoned admission of evidence seized in violation of the Fourth Amendment would inevitably encourage police ignorance of the law, for, as stressed above, there would no longer be any incentive for police to be fully aware of the law. Over time, this circumstance would itself produce greater police illegality. Professor Kaplan, a critic of the exclusionary rule, concedes the point, admitting that such an exception

> would put a premium on the ignorance of the police officer and, more significantly, on the department which trains him. A police department dedicated to crime control values would presumably have every incentive to leave its policemen as uneducated as possible about the

law of search and seizure so that a large percentage of their constitutional violations properly could be labeled as inadvertent. Kaplan, "The Limits of the Exclusionary Rule," 26 Stan L Rev 1027, 1044 (1974).

Even Judge Wilkey, an intense opponent of the rule, finds a "good faith" exception unpalatable, agreeing that "[t]he 'good faith' exception puts a premium on ignorance and lack of training in law enforcement agencies." Wilkey, "Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule," (National Legal Center for the Public Interest, 1982) at 36.

See also Schlesinger, Hearings at 72 and 803; prepared statement and letter of the Police Executive Research Forum, Hearings at 298 and 795; American Bar Association letter, Hearings at 797-798; Sachs statement, Hearings at 43; LaFave, "The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith,' " 43 Pitt L Rev 307, 342-343 (1982); Mertens and Wasserstrom, *supra*, 70 Geo L J at 431.

That a "reasonable mistake" exception would promote official ignorance of the law is further illustrated by statements such as those by the Solicitor General and Petitioners' *amici* in these cases that "in many of the cases to which a reasonable mistake exception would apply, there is no misconduct to deter." Brief for the United States at 87; Brief of *Amici* State of Kansas, *et al*, at 3; Brief of *Amici* Seven Former Members of the Attorney General's Task Force, *et al*, at 8, 12-15, 17-19. These statements are completely unsupportable, for it is implicit in the notion of a "reasonable mistake" exception that there *was* some conduct which was *constitutionally* unreasonable and which should not have occurred. If the Government of the United States and some of the nation's highest-ranking law enforcement officials are now equating reasonableness of belief with lawfulness of conduct, then adoption of the proposed exception would most assuredly result in drastically increased police ignorance.

— Administrative Unfeasibility Of A "Good Faith," "Reasonable Mistake" Or "Technical Violation" Rule

A "reasonable mistake" exception would also create an impossible administrative situation. If this Court were to adopt a test that asked whether a reasonably well-trained officer would have made the same mistake, a suppression hearing — after determining that a Fourth Amendment violation had occurred — would then reasonably be expected to consider all of the following circumstances:

> What was the exact basis for this officer's belief that the misconduct involved here was lawful? How long has the officer been working in law enforcement? How many times has he or she faced a similar situation? Has he or she made this error before and, if so, how many times?
>
> At the time the officer received his or her initial training, how much instruction was provided on Fourth Amendment issues in general and on this issue in particular? How much training was provided as to other constitutional rights? How much Fourth Amendment training was provided to officers in other nearby departments? How much additional training on Fourth Amendment issues would have been reasonably available locally? How did the officer score on test questions concerning Fourth Amendment rights?
>
> How much subsequent training has this agency offered on Fourth Amendment questions in general and on this question in particular? How much of that training has this officer received? How much subsequent training have other nearby departments offered, and how much additional training would have been reasonably available locally? How much of this training is mandatory?

What procedures does this agency have for disseminating and explaining information on significant new appellate decisions on Fourth Amendment rights? How regularly are these procedures followed and, if applicable, were they followed in this case?

What provision has this agency made to have legal advice available to on-duty officers? Did the officer obtain or seek that advice in this case? How many times in the past has he or she sought legal advice? How often do other officers in the department seek legal advice?

How carefully are the officer's Fourth Amendment activities supervised? How carefully were they supervised in this case? What is the policy and what is the practice of the department as to consequences to officers for committing Fourth Amendment violations? Has he or she ever been disciplined for this or a similar violation?

These questions are basic ones which would need to be answered in any case, and the answers to some would invariably raise others. Moreover, the inquiry would become geometrically more complicated where more than one officer was involved in the arrest or search or officers from more than one department were involved, each of which is a routine occurrence. Such litigation wuld have nothing to do with adjudication of Fourth Amendment rights. It would be "an unabated waste of judicial resources." Wilkey, *supra*.

Further, given the differences in training in different departments, it would also be virtually impossible to establish a single standard of reasonableness, for a federal agent or an officer in a large, urban department would almost certainly be better trained than an officer in a small or rural department or a department with a minimal budget.

— Impact On Development Of Substantive Law

This Court did not develop substantive Fourth Amendment law until after *Weeks*, and it did not seriously apply substantive Fourth Amendment law to the states until after *Mapp*. A decision creating a "reasonable mistake" exception to the exclusionary rule would avoid the need to reach Fourth Amendment questions in many cases and would, therefore, " 'stop dead in its tracks judicial development of . . . [these] rights.' " LaFave, *supra*, 43 Pitt L Rev at 354, quoting Brennan, J., dissenting in *United States* v *Peltier*, *supra*, 422 at 554. Even if the exception were stated to require an initial decision as to the legality of the police conduct involved, in practice busy trial courts with heavy dockets could be expected to do just the opposite. Indeed, the Solicitor General seeks just such a result. Brief for the United States at 74-76. Such a practice would also be consistent with this Court's long-standing policy of avoiding constitutional questions whenever possible. *NAACP* v *Alabama*, 357 US 449 (1958). As a result, Fourth Amendment law would atrophy.

— Impossibility Of "Technical" Or "Negligent" Violation Exception

A "reasonable mistake" or "good faith" exception to the exclusionary rule would also fail to provide an appropriate means of accounting for purportedly "technical" or "negligent" violations of the Fourth Amendment. A separate standard for assertedly minor constitutional violations would be inappropriate in any event, for as noted above, p 5, n 2, the Constitution protects against " 'the overzealous as well as the despotic,' " and it is a contradiction in terms to speak of a "technical" violation of a basic Constitutional right. Cf., LaFave, *supra*, 43 Pitt L Rev at 341.

A "technical" or "negligent" mistake exception would also be unenforceable. An analogous rule was rejected by this Court in *Irvine* v *California*, 347 US 128 (1954), where

Justice Jackson, in his plurality opinion, "decline[d] to introduce vague and subjective distinctions" into rules for the administration of constitutional rights, 347 US at 134, and Justice Clark, concurring, stressed:

> Of course, we could sterilize the rule announced in *Wolf* by adopting a case-by-case approach to due process in which inchoate notions of propriety concerning local police conduct guide our decisions. But this makes for such uncertainty and unpredictability that it would be impossible to foretell — other than by guesswork — just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. 347 US at 138.

Pitler has similarly refuted the argument that only "non-technical" violations of *Miranda* v *Arizona*, 384 US 436 (1966), should require exclusion:

> [Such a rule] involves a great deal of subjectivity on the part of judges, making it extremely difficult to draw any real lines of distinction. Unable to foresee what activity will result in the exclusion of evidence, law enforcement officials may find it difficult to establish workable rules of procedure and convenient not to take the proscription seriously. Pitler, " 'The Fruit of the Poisonous Tree' Revisited and Shepardized," 56 Cal L Rev 579, 583 (1968)

THE EXCLUSIONARY RULE HAS MINIMAL EVIDENTIARY COSTS.

— Introduction

A "good faith" or "reasonable mistake" exception is not warranted by the evidentiary costs of the rule. Contrary to the often-voiced claim that the rule results in large numbers of guilty persons going free, the empirical

record belies this claim. As this Court emphasized in *Elkins*, *supra*, 364 US at 217, the rule is remedial, not punitive, and, contrary to Judge Wilkey's assertion, it is not "the inevitable and certain result" of application of the rule "that the guilty criminal defendant goes free." Wilkey, "The Exclusionary Rule: Why Suppress Valid Evidence?" 62 Judicature 215, 223 (1978). Application of the rule results only in the loss of that evidence obtained by or directly derived from the violation. Only in possessory offense cases is an end to the prosecution likely.[9]

It is also not true that "the exclusionary rule benefits only those who are unquestionably guilty," Brief for the United States at 69, or is unique in preventing reliable evidence from being presented in court. Innocent persons who are not illegally searched because of police respect for the present consequences of an illegal search are in a very concrete way protected by the rule. Further, an accused may have been physically near contraband seized from a place in which he or she had a reasonable expectation of privacy without having been in possession of the contraband. Numerous persons find themselves in highly suspicious circumstances at one time or another without having committed any crime whatever. Cf., e.g., *United States* v *Pintado*, __ F2d __ [#82-5503] (11th Cir 1983); *United States* v *Soto*, __ F2d __

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[9] In many cases, convictions are, in fact, obtained following reversal without the use of illegally seized evidence. In *Coolidge* v *New Hampshire*, 403 US 443 (1971); *Davis* v *Mississippi*, 394 US 721 (1967); and *Bumper* v *North Carolina*, 391 US 543 (1968), for example, defendants were all re-convicted without the use of the evidence suppressed in their individual cases. Cf. Mertens and Wasserstrom, *supra*, 70 Geo L J at 445-446. The myth equating suppression with dismissal often draws on then-Judge Cardozo's line from *People* v *DeFore*, 242 NY 13, 21, 150 NE 585, 587 (1926), "The criminal is to go free because the constable has blundered." Although often quoted, this statement is inaccurate. Cardozo's suggested best alternative to a suppression rule is also worth noting: "The officer might have been resisted . . ." *Id.* *Amicus* doubts that such an option was reasonable in 1926; in 1983, it would be virtually suicidal.

[#83-1099] (2d Cir 1983); *United States* v *Bethea*, 442 F2d 790 (DC Cir 1971); *United States* v *Bonds*, 435 F2d 164 (9th Cir 1970).

Reliable evidence is also excluded in numerous other contexts: The attorney-client privilege, the marital privilege and the provisions of FRE 403, for example, all result in reliable evidence being excluded from use in court. A statement given without an effective waiver of rights is also suppressed without regard for the reliability of the statement. Far from contributing to "erroneous verdicts," Brief for the United States at 34, however, these rules of exclusion, like their Fourth Amendment counterpart, properly reflect the high values our jurisprudence places on considerations other than mere presentation of all reliable evidence.[10]

The exclusionary rule does not in any way define what police conduct is lawful or unlawful; it merely defines the procedural remedy for some unlawful conduct. It is the Fourth Amendment which restricts the activities of the police and of the courts, and it is the Fourth Amendment which, when followed, at times deprives the government of some evidence.

An officer who complies with the Fourth Amendment in the first place obtains no less admissible evidence than an officer who has violated the rule and had evidence suppressed as a result. In fact, the prudent officer may obtain *more* admissible evidence. By obtaining a properly supported search warrant to support his or her actions in a situation where another officer acts unjustifiably without a warrant, or hastily with an inadequate warrant, for example, the officer abiding by the Constitution obtains more evidence for use in a prosecution.

[10] The basic rule requiring acquittal unless guilt is proven beyond a reasonable doubt also results at times in the freeing of persons who are, in fact, guilty. An acquittal growing, in part, out of the exclusion of illegally seized evidence is no more an erroneous verdict, however, than is an acquittal based on proof which fails to satisfy a jury beyond a reasonable doubt.

— Empirical Evidence On Costs Of The Rule

Empirical evidence on the evidentiary costs of Fourth Amendment enforcement within the federal system demonstrates an extremely minimal impact on the results of criminal prosecutions. In a 1979 study of 2,804 defendant cases in 38 United States Attorneys' offices, the General Accounting Office found that in less than half the cases involving a search or seizure was a motion to suppress even filed and that in only 1.3% of the defendant cases was evidence excluded as the result of the filing of a motion to suppress. General Accounting Office, "Impact of the Exclusionary Rule on Federal Criminal Prosecutions," (1979) at 9-11. Even where a motion was granted in whole or in part, the rate of conviction remained over 50% (as compared with an 84% conviction rate in cases where motions had been denied). *Id.*, at 13. Overall, a finding of illegal search and seizure resulted in dismissal or acquittal in only 0.7% of the cases studied. Moreover, in cases where prosecution was declined, search and seizure considerations played no part whatever in the decision not to prosecute in all but 0.4% of cases. *Id.*, at 13-14.[11]

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[11] Citing the December, 1982, National Institute of Justice report, "The Effects of the Exclusionary Rule: A Study in California," the Government criticizes the GAO report, claiming that " '[m]ost of the federal caseload at the time of the [GAO] study was composed of such white collar crimes as embezzlement, fraud and forgery. Search and seizure issues are seldom raised in these cases.' " Brief at 70, citing NIJ study at 7. The NIJ study cites no authority for this claim, and, in fact, it is incorrect: The GAO study determined that, depending on the size of the United States Attorney's office studied, between 69% and 88% of the cases accepted for prosecution involved charges where seized evidence would be susceptible to search and seizure challenge. GAO report, Appendix II at 7.

At the Senate Subcommittee hearings the Government also questioned the reliability of the GAO's findings for their asserted failure to consider prosecutions dropped prior to formal entry into the system. Hearings at 87. However, this factor, too, was expressly accounted for in the study. GAO report, Appendix II at 13-14.

Two other studies, one of prosecutions in Washington, D.C., and other cities by the Institute for Law and Social Research [Inslaw] and the other in New York City by the Vera Institute of Justice, provide further support. Inslaw found that Fourth Amendment issues "appear to have little impact on the overall flow of criminal cases after arrest," Geller, *supra*, 67 ABA J at 1644, and the Vera Institute concluded that the exclusionary rule "does not seem to produce dismissals in cases brought into the criminal process in which the searches are probably illegal and the evidence could be suppressed." *Id.*

Most recently, the 1982 National Institute of Justice study, "The Effects of the Exclusionary Rule: A Study in California," found that only 4.8% of all felony cases rejected for prosecution in California between 1976 and 1979 – *only 0.8% of all cases referred for prosecution – were declined for search and seizure problems.*[12, 13]

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[12] To the NIJ, this demonstrated "a major impact of the exclusionary rule on state prosecutions." NIJ study at 2. This conclusion is impossible to square with the study's own factual results however.

The Brief of *Amicus* National District Attorneys Association, Inc., [hereafter NDAA] is also misleading when it asserts that one-third of the persons arrested in Los Angeles on felony drug charges do not come to trial because of search and seizure problems: Of the 2,461 felony cases presented for prosecution in the Pomona and Central Operations offices of the Los Angeles District Attorney's office in 1981, only 121 cases, 4.9%, were rejected for search and seizure problems.

[13] The Government and *Amicus* NDAA argue, relying on the NIJ study, that the exclusionary rule tends to free the recidivist. Brief for the United States at 71, n 36; Brief of *Amicus* NDAA at 9. That an accused's prior or possible future criminal record should have any bearing whatever on his or her right to be free of an illegal search or seizure is a notion fundamentally inconsistent with the foundations of our society. Indeed, "the safeguards of liberty have frequently been forged in controversies involving not very nice people." *United States* v *Rabinowitz*, 339 US 56, 69 (1950), Frankfurther, J., dissenting. The Government's and NDAA's source does not even bear out their assertion, moreover: The figures relied on involve merely arrests and not convictions. NIJ study at 2.

Professor LaFave has also written that, "[T]here is reason to believe that the 'cost' of the exclusionary rule, in terms of acquittals or dismissed cases, is much lower than is commonly assumed." LaFave, *Search and Seizure* § 1.2 n 9 (1981 Supp).

The American Bar Association, which "strongly supports retention of the exclusionary rule" on constitutional and practical grounds, has concluded that the "rule is not responsible for hordes of criminals going free" and that "a dispassionate examination of the facts belies the mythology surrounding the rule." 67 ABA J 1614 (1981); see also Greenhalgh, Hearings at 76 ff.

— Objective Limits On Application Of The Rule

The exclusionary rule is also already extremely limited in application, many of these limitations having been added by this Court in the past ten years.[14] In its present form, the rule is available only to individuals whose personal Fourth Amendment rights have been violated, *United States* v *Salvucci*, 448 US 83 (1980); *Rawlings* v *Kentucky*, 448 US 98 (1980); and it does not prevent the use of unconstitutionally seized evidence before a grand jury, *United States* v *Calandra*, 414 US 338 (1974), or in civil proceedings, *United States* v *Janis*, 428 US 433 (1976), or in impeaching a defendant's testimony, *United States* v *Havens*, 446 US 620 (1980).

The exclusionary rule will also not prevent a person's prosecution when he or she has been unconstitutionally seized, *Frisbie* v *Collins*, 342 US 519 (1952), nor a victim's in-court identification of an accused following an illegal arrest, *United States* v *Crews*, 445 US 463 (1980), nor the use of evidence discovered by means independent of police misconduct, *United States* v *Ceccolini*, 435 US 268

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[14] Many of these changes have come subsequent to Justice White's dissent in *Stone* v *Powell*, 428 US 465, 536-542 (1976), in which he criticized the breadth of the rule and suggested a "good faith" exception.

(1978), or evidence whose connection with the constitutional violation is so attenuated as to dissipate the taint. *Nardone* v *United States*, 308 US 341 (1939). Evidence gained as a result of an arrest valid on Fourth Amendment grounds but for violation of an enactment later held unconstitutional on due process grounds is also admissible. *Michigan* v *DeFillippo*, 443 US 31 (1979).

These limitations are significant, for they confine the impact of the rule to (1) criminal prosecutions where the government is intending to use (2) evidence obtained as a direct consequence of (3) a Fourth Amendment violation (4) as substantive proof (5) at a stage where the rules of evidence apply (6) against an accused with a significant personal connection with the area searched or the item(s) seized.

In addition, a state prisoner who has had an opportunity for full and fair litigation of Fourth Amendment claims in state court may not obtain federal *habeas corpus* relief on the ground that evidence introduced at his or her trial was obtained as a result of an unconstitutional search or seizure. *Stone* v *Powell*, *supra*.

A "GOOD FAITH" OR "REASONABLE MISTAKE" EXCEPTION WOULD HAVE DETRIMENTAL SYMBOLIC AND HUMAN COSTS, PARTICULARLY FOR MINORITIES.

— Symbolic Costs

Creation of a "good faith" or "reasonable mistake" exception to the exclusionary rule would also have a stark symbolic significance. To this Court, the public and the police, the ultimate yardstick of legality is admissibility:

> A ruling admitting evidence at a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence. *Terry* v *Ohio*, *supra*, 394 US at 13.

A decision creating a "good faith" exception would lead police to feel that "the fourth amendment is not a serious matter, if indeed it applies to them at all." Loewenthal, *supra*, 49 UMKC L Rev at 30. Professor Ball, too, concedes that "[a] signal from the Court that it is abating its aggressive enforcement of fourth amendment requirements is apt to evoke a consistent response from the police." *Id.*, 69 J Crim L & Criminology at 656. See also LaFave, *supra*, 43 Pitt L Rev at 358.

> Moreover, police doubts are likely to be stronger now than they would be if the exclusionary rule had never been imposed. *Since the rule has become functionally identified with the fourth amendment, the removal of the rule is likely to be interpreted as an implicit condoning of violations of the fourth and fourteenth amendments, no matter what substitute remedies may be applied.*[15] Loewenthal, *supra*, 49 UMKC L Rev at 30 (emphasis added)

See also Canon, "Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for its Retention," 23 S Tex L J 559 (1982).

— Impact Of The Rule On Protecting The Rights Of Minorities

History also teaches that where police illegality occurs, the victims of that illegality are disproportionately members of racial minorities. "[O]ur unexpiated heritage of racism," McGowan, "Rule-Making and the Police," 70

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[15] In fact, there are no viable alternatives to exclusion. The Solicitor General concedes doubt as to this point, Brief at 86-88, and this Court, too, has suggested doubts as to the viability of alternatives other than exclusion. *Franks* v *Delaware*, 438 US 154, 169 (1978).

Additionally, to the extent that civil remedies might be viable in some cases, where the error was a judicial officer's, the potential defendant is immune from suit. *Stump* v *Sparkman*, 435 US 349 (1978).

Further, because of lack of access to legal services and lack of capacity to prove damages, poor persons are the least likely victims of police misconduct to be in a position to bring successful civil actions.

Mich L Rev 659, 669 (1972), has long been reflected in police lawlessness against minorities. Cf., e.g., *Report of the National Advisory Commission on Civil Disorders* (1968) at 301 and 304. This Court, too, has noted the problem of chronic police-community tension in black and other minority communities. *Terry, supra*, 392 US at 14, n 11. See also, generally, United States Commission on Civil Rights, *Who is Guarding the Guardians?* (1981) at 6.

The dramatic increase in police training and awareness generated by the exclusionary rule has produced, in turn, an increased respect by police for individuals' constitutional rights, an incomplete process of particular value to minorities. This process would be reversed if the proposed exception were created: A "good faith" exception to the exclusionary rule would not just lead to increased police illegality, it would almost certainly produce a disproportionate increase in official illegality against racial minorities.

— The Importance Of Stability In The Law

In the twenty-two years since *Mapp*, the exclusionary rule has become an accepted fact of life to the officer on the beat, the police administrator responsible for departmental training and the average citizen going about his or her daily life. It has increasingly become a part of the basic fabric of our criminal procedure, an aspect of due process " 'rooted in the traditions and conscience,' " *Rochin* v *California*, 342 US 165, 169 (1952), of a full generation of Americans.[16]

Moreover, due process has always been considered by this Court to be a forward-looking concept reflecting a "progressive and self-confident society." *McNabb* v *United States*, 318 US 332, 344 (1943). Retreat from prior constitutionally-based holdings has been strongly disfavored.

[16] Cf., e.g., *Chicago Tribune* lead editorial, "Defend the Exclusionary Rule," January 16, 1983, sec 2, p 6; *New York Times* editorial, "Let Facts, Not Faith, Guide the Police," January 21, 1983, p 24.

Just as *Miranda* v *Arizona*, *supra*, was widely and intensively criticized for many years but was ultimately reconfirmed in *Edwards* v *Arizona*, 451 US 477 (1981), so, too, ought this Court reject any modification of the exclusionary rule. Adherence to prior decisions is a paramount principle in the law, and only in cases of the clearest error will this Court set aside its own prior judgment:

> It is almost as important that the law should be settled permanently, as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly, unless clearly erroneous. Vacillation is a serious evil. *Gilman* v *Philadelphia*, 3 Wall 713, 724 (1866).

This principle is particularly important where a rule sought to be overruled or significantly modified is a relatively recent one, cf., e.g., *Goodtitle ex dem. Pollard* v *Kibbe*, 9 How 471, 478 (1850), especially where the composition of the Court has changed substantially in the interim.[17]

CONCLUSION

By its holdings, the language used to express them and the symbolic meaning attached to them by those most directly affected as well as by the public in general, this Court shapes not just the Constitution but many aspects of our society for the generations that will follow us. As technology progresses, Fourth Amendment rights become increasingly fragile against "a vast array of

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[17] Cf., *Malinski* v *New York*, 324 US 401, 417 (1945), Frankfurter, J., concurring: "The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncracies of a merely personal judgment."

electronic surveillance," *United States* v *Bailey*, 628 F2d 938, 947-949 (6th Cir 1980), Keith, J., concurring,[18] and it becomes increasingly important that this Court recall the history and values of the Amendment to assure its protection in the face of new, more insidious dangers.

Justices Brandeis and Stewart, in two noted opinions, have prophetically explained why the exclusionary rule promotes rather than hinders respect for the law. Their words vividly illustrate why this Court must reject the proposed exception:

> In a government of laws, existence of the government will be imperilled if it fails to observe that law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face. *Olmstead* v *United States, supra*, 277 US at 485, dissenting opinion, cited with approval in *Elkins* v *United States, supra*, 364 US at 223.

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[18] See also Dash, Knowlton and Schwartz, *The Eavesdroppers* 339-379 (1959); Westin, *Privacy and Freedom* 69-89 (1967); Sachs, Hearings at 27-28.

> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law [the Fourth Amendment] and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won — by legal and constitutional means in England, and by revolution on this continent — a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important. *Coolidge* v *New Hampshire*, *supra*, 403 US at 455.

For all of these reasons, a "reasonable belief" or "good faith" exception to the exclusionary rule should be rejected, and the exclusionary rule should be reaffirmed in its present form.

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